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State v. Ana Respondent's Brief Dckt. 44228

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44228
Plaintiff-Respondent,)	
)	Elmore County Case No.
v.)	CR-2015-2195
)	
GEORGE KUUALOHA ANA, JR.,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Ana failed to establish that the district court abused its discretion by imposing a unified sentence of 10 years, with five years fixed, upon his guilty plea to lewd conduct with a minor under 16?

Ana Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Ana pled guilty to lewd conduct with a minor under 16 and the district court imposed a unified sentence of 10 years, with five years fixed. (R., pp.65-68.) Ana filed a notice of appeal timely from the judgment of conviction. (R., pp.69-72.)

Ana argues the district court abused its discretion by not placing him on probation in light of the fact that he is a first-time offender, has served in the military, has mental health issues, and is amenable to treatment. (Appellant's brief, pp.2-3.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). Pursuant to I.C. § 19-2521(1):

The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) A lesser sentence will depreciate the seriousness of the defendant's crime; or

(d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or

(e) Imprisonment will provide an appropriate deterrent for other persons in the community; or

(f) The defendant is a multiple offender or professional criminal.

The maximum prison sentence for lewd conduct with a minor under 16 is life. I.C. § 18-1508. The district court imposed a unified sentence of 10 years, with five years fixed, which falls well within the statutory guidelines. (R., pp.65-68.) At sentencing, the district court specifically considered the criteria for placing Ana on probation but declined to do so in light of, among other things, the seriousness of the offense and the continuing “detrimental” impact that it will have on the victim. (4/25/16 Tr., p.53, L.9 – p.57, L.12.) The state submits that Ana has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm Ana's conviction and sentence.

DATED this 3rd day of January, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of January, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JASON C. PINTLER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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 1 be sent to prison for a punishment aspect. Additionally,
 2 a lesser sentence would depreciate the seriousness of
 3 this crime, Your Honor. This was a very serious crime.
 4 Placing Mr. Ana on a period of probation would seriously
 5 depreciate this — this offense and what actually
 6 occurred here.
 7 So, the State would submit that for — for
 8 that purpose, mister — a — a prison sentence would be
 9 an appropriate sentence in this case.
 10 For rehabilitation purposes, obviously
 11 Dr. Johnston does find that Mr. Ana would be amenable to
 12 treatment in the community. He could get rehabilitation
 13 in the facility was well.
 14 And then, in terms of deterring other
 15 individuals, I'm not certain whether this would deter
 16 another individual. Obviously, individuals in a parental
 17 role are likely not thinking that their children, or the
 18 children they're taking care of, are — are going to
 19 report this when they're engaging in these kinds of
 20 behaviors. But the State would certainly hope that a
 21 prison sentence would likely deter Mr. Ana, and other
 22 individuals, more than simply placing him on probation
 23 would.
 24 So, the State would ask that the Court impose
 25 that sentence. Thank you.

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 1 Judge. Sending him to prison for 25 years, or 10 years,
 2 is not a deterrent. Age is a deterrence, keeping him
 3 away from minor children is a deterrence.
 4 So, I think Dr. Johnston's report, based on
 5 the State's desire to have Dr. Johnston do the report, is
 6 accurate. If they didn't understand why Dr. Johnston
 7 didn't do this or find these things, they should have
 8 picked up the phone, and called him, and asked him for
 9 some more information. They didn't do it; they were
 10 satisfied with it until it comes back in a position they
 11 don't want.
 12 So, I think it is appropriate, Judge, that my
 13 client — if you want to put him on probation for 20
 14 years, he's not going to live that long, I don't think.
 15 I — I — but, I mean, that's a risk we all take with
 16 life, that's the deterrent, putting him on probation.
 17 He's going to have to register as a sex offender; he's
 18 not going to be around minor children. He is amenable to
 19 treatment. He doesn't have a criminal history at all.
 20 And in the broad, homeland range of — of
 21 crimes of this nature, he's not at the far extreme
 22 nature, based on the crime that he admitted to. I think
 23 we've all seen that over the years of our practice.
 24 So, I think what the State is asking you to
 25 do is have an emotional, knee jerk reaction, and do the

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 1 THE COURT: Ms. Kuehn, thank you.
 2 Mr. Ratliff, I'll hear your recommendations,
 3 sir.
 4 MR. RATLIFF: Well, Judge, first and
 5 foremost, my client pled guilty to the manual to genital
 6 contact in Court II, not the other stuff that she wants
 7 you to sentence him for. That's not before the Court for
 8 sentencing matters.
 9 It's my opinion, Judge, that what she says
 10 about my client not taking accountability is not an
 11 accurate reflection of the PSI. It says that he was
 12 ashamed, sad, and disgusted by his conduct. And he
 13 actually is remorseful, Judge. He understands what he
 14 did to this child is wrong.
 15 PTSD manifests itself in different ways.
 16 I've seen it over the years in my military service, I've
 17 seen it in the reports. And what I don't — can't get my
 18 head around, Judge, is the State wanted Dr. Johnston to
 19 do the psycho-sexual evaluation because he thought —
 20 they thought he was the expert that could get a handle on
 21 what my client's done and where he's at. He's come back
 22 as low risk to reoffend. The LSIR score's a — I think
 23 is an 8.
 24 I understand the need for punishment. My
 25 client's going to be 70 years old in a couple months,

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 1 10 plus 15, without any basis for it. And for that
 2 reason, Judge, I think he's entitled to probation.
 3 THE COURT: Mr. Ratliff, thank you.
 4 Mr. Ana, before I sentence you, sir, you have
 5 the right to speak with the Court. You're not required
 6 to. Is there anything you would like to say?
 7 THE DEFENDANT: No, sir.
 8 THE COURT: Mr. Ana, thank you.
 9 Mr. Ana, on your guilty plea to this felony
 10 offense of Committing Lewd Conduct with a Minor Under the
 11 Age of 16, I will find that you are guilty. I will enter
 12 a judgment convicting you of that offense.
 13 Mr. Ana, in sentencing you, sir, I'm required
 14 to balance a number of factors. Those factors include
 15 protection of the community. I can protect the community
 16 by punishing you, by deterring you, by deterring others,
 17 and by fashioning a sentence that allows you to
 18 rehabilitate yourself. I have — the legislature has
 19 committed to this Court rather broad discretion in this
 20 type of offense, Mr. Ana. There is no minimum punishment
 21 that I must impose; however, the maximum punishment I can
 22 impose is incarceration up to the remainder of the
 23 expiration of your natural life.
 24 In deciding how to exercise that discretion,
 25 I am struck by a number of things in these materials,

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1 Mr. Ana.

2 One, I agree with many of this things your

3 attorney has said. You are almost 70 years of age, you

4 have no prior criminal history, you have led, by all

5 accounts, a law abiding and productive life. There —

6 you have people who think well of you. Certainly, you

7 have accomplished many things of note.

8 You are, according to Dr. Johnston, a low

9 risk, as against other sex offenders, to engage in this

10 type of behavior again. You are also likely to comply

11 with rehabilitation, should I require that you attend and

12 complete some sex offender treatment.

13 I have to balance those factors in your favor

14 with the facts that you were in a care, parental

15 relationship with this child at the time you abused her;

16 there is a significant age difference. This is a

17 significantly young child; she was 9 years of age at the

18 time of your conduct.

19 I agree, large, with your attorney's

20 characterization of your statements, Mr. Ana. I think

21 that you are expressing remorse. However, I agree

22 somewhat with the State's attorney. It is evident to me,

23 in reading your statements both to the police and to

24 Dr. Johnston, that you have very little insight into the

25 impact that your behavior will have on this child, the

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1 occasions to the police. Your granddaughter, for lack of

2 a better term, felt coerced by you, she felt threatened

3 by you, if she didn't go along with this behavior.

4 Prison will provide an appropriate punishment

5 and deterrent to you. That is certainly true; I'll make

6 that finding.

7 Imprisonment will provide an appropriate

8 deterrent for other persons in the community. I

9 certainly hope that that is true, although that's a

10 finding that's difficult to make in any case, simply

11 because that information is not readily available.

12 That the defendant is a multiple offender or

13 a professional criminal. That — I find that that is not

14 true. This is your first criminal offense.

15 On balance, Mr. Ana, I'm simply — I do not

16 believe that the recommendation of the State is

17 appropriate; sending you to prison for 10 years fixed and

18 25 years, essentially, is the equivalent of incarcerating

19 you to — for the expiration of the remainder of your

20 natural life. That would be a life sentence for someone

21 your age, Mr. Ana. I'm not convinced that that is

22 appropriate.

23 However, I cannot agree with your attorney in

24 that this is a case that is suitable for probation.

25 Despite you being a low risk, Mr. Ana, I think suspending

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1 significant detrimental consequences that your behavior

2 are likely to have on her for the rest of her life. I

3 must balance those factors as well.

4 In deciding whether to impose a period of

5 incarceration versus a period of probation, I am required

6 to consider the following things, pursuant to Idaho Code

7 19-2521.

8 The first is whether there's an undue risk

9 that during the period of a suspended sentence or

10 probation that you would commit another crime. I'm not

11 able to make that finding. You have no prior criminal

12 record. Dr. Johnston opines that you are a low risk to

13 commit this type of offense in the future. Therefore, I

14 cannot find there's an undue risk that you would commit

15 another offense.

16 That you are in need of a correctional

17 treatment that can be provided most effectively by your

18 commitment to an institution. Certainly, you are in need

19 of treatment. Dr. Johnston opines that that treatment

20 can be had both in the community and in an incarceration

21 setting. Therefore, that's kind of a neutral factors.

22 That a lesser sentence will depreciate the

23 seriousness of your crime. I believe that is certainly

24 true in this case. In your case, Mr. Ana, you admitted

25 this manual/genital contact occurred on multiple

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1 the execution of a prison sentence would simply

2 depreciate the seriousness of what you did, the

3 seriousness of the impact that your desire to have sex

4 will have on your — this 9-year-old for the rest of her

5 life. I'm also concerned that it would send an

6 inappropriate message of deterrence to you and to others.

7 For that reason, Mr. Ana, it will be the

8 judgment of this Court that you be sentenced to serve a

9 term of ten years in the State penitentiary; that will

10 consist of five years fixed, plus five years

11 indeterminate. I will order that sentence into execution

12 immediately.

13 I will not impose a fine. I will impose

14 those court costs and fees mandated by statute. I will

15 not impose the requested payment to the victim simply

16 because I find that it is unlikely that it will be paid.

17 Mr. Ana, you have the right to appeal this

18 judgment convicting you of this offense, sentencing you

19 to this ten-year term in the State penitentiary. That

20 appeal must be taken to the Idaho Supreme Court; it must

21 be taken within 42 days of today's date. In that appeal,

22 you have the right to the assistance of an attorney. If

23 you are indigent, the costs of the attorney and the costs

24 of the appeal will be paid for by the State.

25 Do you have questions about your appeal